APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

The NETWORK PROJECT ET AL., *Appellants*,

v.

CORPORATION FOR PUBLIC BROADCASTING,
a corporation, et al.

No. 75-1963.

Argued June 8, 1976.

Decided July 22, 1977.

Before ROBINSON and WILKEY, Circuit Judges, and WILLIAM J. JAMESON,* United States Senior District Judge for the District of Montana.

Opinion for the Court filed by SPOTTSWOOD W. ROBINSON, III, Circuit Judge.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

Appellants are numerous viewers of public television (viewer-appellants) [1] and three individuals who have written, directed and produced public television programs (producer-appellants).[2] Appellees are the Corporation for Public Broadcasting (CPB), established pursuant to con-

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] Viewer appellants are the Network Project and the American Civil Liberties Union, organizations whose memberships include viewers of public television, and 11 individuals who are viewers also.

[2] Producer appellants are Paul Jacobs, Saul Landau and John Kuney.

gressional authorization as a conduit of federal funds for public television, and the Public Broadcasting Service (PBS), created by CPB to distribute public television programs to local stations, together with Clay T. Whitehead, who as a former presidential aide, was Director of the Office of Telecommunications Policy. The appeal emanates from a judgment of the District Court dismissing an action precipitated by activities allegedly violative of rights secured by statute and the Constitution.[3]

In their complaint, appellants charge that appellees have censored and controlled the content of public television in contravention of the First Amendment [4] and legislation known as the Public Broadcasting Act.[5] Specifically, the complaint avers that CPB and PBS have eliminated funding for most or all controversial programs, and now require detailed descriptions of program content as a condition of funding. The complaint further avers that CPB and PBS have prescreened and censored programs, have required program changes prior to distribution, and have issued warnings to local stations about programs considered by them to be controversial. Whitehead and Patrick J. Buchanan, another former presidential aide once a party,[6] are accused of attempts to cause CPB and PBS to remove all controversial programs from the air.

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[3] *Network Project v. Corporation for Pub. Broadcasting*, 398 F. Supp. 1332 (D.D.C. 1975).

[4] U.S.Const. amend. I.

[5] Act of Nov. 7, 1967, Pub.L.No.90-129, tit. II, § 201, 81 Stat. 368, as amended, 47 U.S.C. §§ 396 *et seq.* (Supp. V 1975), hereinafter cited as codified.

[6] Buchanan was a special consultant to the President. Though a defendant in the District Court, he is not a party here. See text *infra* following note 10.

Viewer-appellants seek declaratory and injunctive relief prohibiting appellees from interfering with their asserted right to see uncensored public television programs. Producer-appellants demand damages for injury to their professional reputations and their ability to market their work products allegedly resulting from censorship of programs written, directed or produced by them. The District Court first dismissed the suit against the individual defendants as moot.[7] The court then held that appellants had failed to state a claim under the Public Broadcasting Act upon which relief could be granted.[8] Lastly, it dismissed the First Amendment contentions of viewer-appellants for lack of jurisdiction[9] and those of producer-appellants for lack of substantive merit.[10] We reverse the disposition of the First Amendment claims as to both viewer- and producer-appellants. In all other respects, we affirm.

I

The District Court held that insofar as the action sought declaratory and injunctive relief from Whitehead and Buchanan, the presidential aides, it had become moot because of their resignations from office after commencement of suit.[11] Appellants pursue this appeal only against Whitehead, formerly the Director of the Office of Telecommunications Policy.[12] They argue that they should now be allowed to proceed against Whitehead's successor.

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[7] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1335-1337.

[8] *Id.* at 1337-1339.

[9] *Id.* at 1339-1342.

[10] *Id.* at 1341 n. 13.

[11] *Id.* at 1335.

[12] See Reorganization Plan No. 1 of 1970, 3 C.F.R. 1066 (1971).

While Federal Civil Rule 25(d)(1) provides for automatic substitution of a successor,[13] and eliminates the requirement that the plaintiff demonstrate need for continuing the action upon substitution,[14] it will not keep alive an otherwise moot controversy. This principle was firmly established by the Supreme Court's decision in *Spomer* v. *Littleton*.[15] There, residents of Cairo, Illinois, filed suit against Peyton Berbling, State's Attorney for Alexander County, charging him with a variety of racially discriminatory law enforcement practices. After the Seventh Circuit announced its decision on appeal, Spomer was elected to succeed Berbling. Relying on Supreme Court Rule 48(3),[16] Spomer than petitioned for certiorari to challenge the Court of Appeal's approval of the possibility of injunctive relief against the State's Attorney. The plaintiffs did not oppose this substitution, and the Supreme Court granted the writ.

After plenary review, however, the Court found nothing in the record upon which to base a conclusion that a concrete controversy between the residents of Cairo and the State's Attorney still existed.[17] Of primary importance

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[13] Fed.R.Civ.P. 25(d)(1) provides in relevant part that "[w]hen a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."

[14] 3B J. Moore, Federal Practice ¶ 25.09[3] at 25-401 (2d ed. 1974).

[15] 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974).

[16] That rule, which is virtually identical to Fed.R.Civ.P. 25(d)(1), provides that "[w]hen a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."

[17] *Spomer v. Littleton, supra* note 15, 414 U.S. at 520-522, 94 S.Ct. at 688-690, 38 L.Ed.2d at 699-700.

here, the Court emphasized that "[t]he wrongful conduct charged in the complaint is personal to Berbling, despite the fact that he was also sued in his then capacity as State's Attorney," [18] and that "[n]o charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged . . . ." [19] The Court further noted that the plaintiffs made no allegation that Spomer intended to continue the practices of which they complained.[20]

At oral argument, counsel for the State's Attorney had indicated that Spomer did not intend to deviate from the practices of his predecessor.[21] The Court, however, held that "to determine whether respondents have a live controversy, . . . we must look to the charges *they* press." [22] Having found that there was a strong possibility of mootness, the Court remanded the case for a determination as to whether it was moot and whether the plaintiffs desired, and should be permitted, to amend their complaint to include claims for relief against Spomer.[23]

The similarities between *Spomer* and the instant case are obvious and for appellants insurmountable. Here, as in *Spomer*, the wrongful conduct charged is personal to

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[18] *Id.* at 521, 94 S.Ct. at 689, 38 L.Ed.2d at 700.

[19] *Id.*

[20] *Id.* at 521-522, 94 S.Ct. at 689, 38 L.Ed.2d at 699-700.

[21] *Id.* at 522 n. 10, 94 S.Ct. 689 n. 10, 38 L.Ed.2d at 700 n. 10.

[22] *Id.* (emphasis in original).

[23] *Id.* at 522, 94 S.Ct. at 689-690, 38 L.Ed.2d at 700-701. On remand, the plaintiffs informed the Court of Appeals that they did not intend to name Spomer as an additional defendant because they were unable to allege that he was continuing the discriminatory practices of his predecessor. Accordingly, the court dismissed the complaint against Berbling as moot. *Littleton v. Berbling*, No. 71-1395 (7th Cir. Jan. 29, 1975) (unreported).

the named defendant, despite his having been sued in his official capacity.[24] Like the plaintiffs in *Spomer*, appellants here have not averred that it is departmental policy to follow the practices charged. Moreover, appellants have rejected an opportunity to amend their complaint to add allegations that the asserted conduct has continued beyond Whitehead's departure.

On the basis of the complaint,[25] then, we are unable to say that a live controversy now subsists between appellants and the Director of the Office of Telecommunications. Accordingly, we affirm the District Court's dismissal of the suit in that regard.

II

Next to be considered is whether the District Court possessed jurisdiction of appellants' statutory and constitu-

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[24] The complaint charged, *inter alia*, that Whitehead pressured CPB officers to discontinue various controversial programs and to reduce live news coverage. Joint Appendix (J.App.) 19. Appellants' argument that they did not explicitly characterize the conduct of which they complain as personal to Whitehead is beside the point. They did assert that Whitehead committeed certain discrete illegal acts, and in the absence of any allegation that the acts were other than individual—*i. e.*, departmental policy—their complaint can be construed only as charging personal misconduct.

[25] Appellants suggest that an affidavit which Whitehead submitted to the District Court, J.App. 37-41, shows that the acts complained of represented departmental policy, and thus that a live controversy persists in the absence of a disclaimer by Whitehead's successor. This argument is misconceived. The affidavit does not concede that it was departmental policy to interfere with CPB programming decisions; it simply asserts that the Director of the Office of Telecommunications has statutory responsibilities in matters concerning public broadcasting. In any event, Whitehead's representations are irrelevant since mootness must be determined solely by reference to the allegations of the complaining party. *Spomer v. Littleton*, *supra* note 15, 414 U.S. at 522, n. 10, 94 S.Ct. at 689 n. 10, 38 L.Ed.2d at 700 n. 10, quoted in text *supra* at note 23.

tional claims. Jurisdiction was invoked on three separate grounds, all of which were deemed unacceptable. The court declined to exercise federal-question jurisdiction under 28 U.S.C. § 1331,[26] holding that appellants had failed to establish that the requisite $10,000 was in controversy.[27] The court also held that jurisdiction could not be predicated upon 28 U.S.C. § 1361.[28] That provision, which imparts jurisdiction over suits "to compel . . . any agency . . . to perform a duty owed to the plaintiff,"[29] was held inapplicable on the ground that CPB is not an agency, and CPB's directors are not officers, within its contemplation.[30] Finally, without deciding whether it had jurisdiction under 28 U.S.C. § 1337,[31] the court held that no right of action could be implied from the Public Broadcasting Act of 1967 and dismissed appellants' statutory

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[26] "The district courts shall have original jurisdiction in any civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1970), as amended by Act of Oct. 21, 1976, Pub.L.No.94-574, § 2, 90 Stat. 2721.

[27] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1340-1342.

[28] *Id.* at 1339.

[29] "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1970).

[30] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1339.

[31] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopoly." 28 U.S.C. § 1337 (1970).

claims accordingly.[32] In a brief footnote, the court added that "[i]n that instance there is no pendent jurisdiction under § 1337,"[33] and thereby nipped in the bud appellants' undertaking to demonstrate a constitutional basis for relief.

We think that in reaching this last conclusion, the District Court misconceived the scope of pendent jurisdiction. If the court derived power from Section 1337 to adjudicate appellants' statutory contentions—a matter we find not subject to serious dispute[34]—applicable legal principles required that it also hear appellants' constitutional claims as an exercise of pendent jurisdiction.[35] We conclude that its failure to do so constituted an abuse of discretion.[36]

Section 1337 confers jurisdiction on district courts in suits "arising under any Act of Congress regulating commerce . . . ."[37] This grant has been broadly interpreted to reach any federal statute for which the Commerce Clause[38] furnishes a predicate.[39] In *National Broadcast-*

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[32] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1337-1339, 1342.

[33] *Id.* at 1340 n. 9.

[34] We discuss this *infra* text at notes 37-49.

[35] We discuss this *infra* text at notes 50-68.

[36] In light of this disposition, we need not address appellants' other jurisdictional arguments.

[37] See note 31 *supra*.

[38] U.S. Const. art. 1, § 8, cl. 3.

[39] *Cupo v. Community Nat'l Bank & Trust Co.*, 438 F.2d 108, 109-110 (2d Cir. 1971); *Murphy v. Colonial Fed. Savs. & Loan Ass'n*, 388 F.2d 609, 614-615 (2d Cir. 1967); *Imm v. Union R.R.*, 289 F.2d 858, 859-860 (3d Cir.), *cert. denied*, 368 U.S. 833, 82 S.Ct. 55, 7 L.Ed.2d 35 (1961); *Caulfield v. United States Dep't of Agriculture*, 293 F.2d 217, 222 n. 10 (5th Cir.), *cert. dismissed*, 369 U.S. 858, 82 S.Ct. 946, 8 L.Ed.2d 16 (1961).

ing Co. v. United States,[40] the Supreme Court upheld the licensing system established by Congress in the Communications Act of 1934[41] as a proper exertion of its power over interstate commerce.[42] The Communications Act is now fully recognized as an "[a]ct of Congress regulating commerce" within the meaning of Section 1337.[43]

The Public Broadcasting Act originated in the Interstate Commerce Committees of both Houses of Congress, and came into being as an amendment to the Communications Act of 1934.[44] It expressly promotes the establishment and development of noncommercial educational radio and television broadcasting throughout the Nation.[45] These factors alone bring appellants' statutory claims well within the ambit of Section 1337. Indeed, there is nothing on the face of the statute or discernible in its history to suggest that Congress did not continue reliance upon its commerce power—an obvious facet of legislative authority—in passing the Public Broadcasting Act. Nor can there be the slightest doubt that the commerce power

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[40] 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1934).

[41] Act of June 19, 1934, ch. 652, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.* (1970).

[42] *National Broadcasting Co.* v. *United States*, *supra* note 40, 319 U.S. at 227, 63 S.Ct. at 1014, 87 L.Ed. at 1368.

[43] *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 499 (1st Cir. 1950); *Pugach v. Dollinger*, 277 F.2d 739, 741 (2d Cir. 1960) *aff'd*, 365 U.S. 458, 81 S.Ct. 650, 5 L.Ed.2d 678 (1961); *Springfield Television, Inc. v. City of Springfield*, 428 F.2d 1375, 1378 (8th Cir. 1970); *Weiss v. Los Angeles Broadcasting Co.*, 163 F.2d 313, 314 (9th Cir.), *cert. denied*, 333 U.S. 876, 68 S.Ct. 895, 92 L.Ed. 1152 (1947).

[44] S.Rep.No.222, 90th Cong., 1st Sess. 1 (1967); H.R.Rep.No.572, 90th Cong., 1st Sess. 1 (1967), U.S.Code Cong. & Admin.News 1967, p. 1772.

[45] See 47 U.S.C. §§ 396(a), (g) (Supp. V 1975).

provides Congress with ample authority to foster the development of noncommercial television.[46]

For purposes of Section 1337, it is irrelevant that the Public Broadcasting Act might also be upheld as a valid exercise of congressional power to spend for the general welfare.[47] "[T]o found jurisdiction upon § 1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one."[48] It can hardly be gainsaid that the Commerce Clause, a self-sufficient basis for the Act, is at the very least a significant source of legislative authority for its enactment. We hold that the District Court had jurisdiction to consider whether appellants derived a cause of action from the statute, and we later review the court's decision on that score.[49]

Beyond that, since appellants' constitutional and statutory claims "derive from a common nucleus of operative fact"[50] and are such that appellants "would ordinarily

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[46] That the Commerce Clause sustains federal legislation promoting the growth of interstate commerce has long since been settled. *E. g., Second Employer's Liability Cases (Mondou v. New York, N. H. & H.R.R.)*, 223 U.S. 1, 47, 32 S.Ct. 169, 173-174, 56 L.Ed. 327, 345 (1912); *County of Mobile v. Kimball*, 102 U.S. 691, 696-697, 26 L.Ed. 238, 239 (1881); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564, 19 L.Ed. 999, 1001 (1871).

[47] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." U.S.Const. art. I, § 8, cl. 1.

[48] *Murphy v. Colonial Fed. Savs. & Loan Ass'n*, *supra* note 39, 388 F.2d at 615. See also *Davis v. Romney*, 490 F.2d 1360, 1365 (2d Cir. 1974); *Esposito v. Shultz*, 366 F.Supp. 1059, 1061 (N.D. Cal. 1973).

[49] In Part III *infra*.

[50] *UMW v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218, 228 (1966).

be expected to try them [both] in one judicial proceeding,"[51] the District Court clearly had power to hear the constitutional aspects of their lawsuit as a matter of pendent jurisdiction.[52] While "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right,"[53] discretion is not left to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[54] In particular, the exercise of discretion must be responsive to the considerations of judicial economy, convenience and fairness to litigants which underlie and justify the phenomena of pendent jurisdiction.[55]

The District Court appears to have rested its refusal to assume pendent jurisdiction on the misconception that

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[51] *Id.*

[52] *Id.* See also *Apton v. Wilson*, 165 U.S.App.D.C. 22, 35, 506 F.2d 83, 96 (1974); *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 426-427 (3d Cir. 1968), *on remand*, 326 F.Supp. 48 (W.D.Pa.1971), *aff'd in part and rev'd in part*, 463 F.2d 470 (3d Cir. 1972), *cert. denied*, 410 U.S. 913, 93 S.Ct. 966, 3 L.Ed.2d 278, *on remand*, 58 F.R.D. 646 (W.D.Pa.), *aff'd*, 487 F.2d 1394 (3d Cir. 1973); *Burton v. Waller*, 502 F.2d 1261, 1265 n. 1 (5th Cir. 1974), *cert. denied*, 420 U.S. 964, 95 S.Ct. 1356, 43 L.Ed.2d 442 (1975); *Vanderboom v. Sexton*, 422 F.2d 1233, 1242 (8th Cir.), *cert. denied*, 400 U.S. 852, 91 S.Ct. 47, 27 L.Ed.2d 90 (1970).

Another requirement of pendent jurisdiction is substantiality of the primary claim. *UMW v. Gibbs, supra* note 50, 383 U.S. at 725, 86 S.Ct. at 1138, 16 L.Ed.2d at 228. There can be no question but that appellants' primary claim—that a statutory cause of action should be implied—is not wholly without merit, even though it does not prevail. See Part III *infra*.

[53] *UMW v. Gibbs, supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

[54] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280, 296 (1975), quoting *United States v. Burr*, 25 F.Cas., No.14,692d, pp. 30, 35 (Cir. Ct. Va. 1807) (No. 14) (Marshall, C. J.).

[55] *UMW v. Gibbs, supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

pretrial dismissal of the statutory claims necessitated dismissal of the pendent claims as well.[56] It is true that when state and federal claims are dismissed before trial, the state claims should ordinarily be dismissed as well.[57] The policies implicated when a pendent claim is one based on state law, however, are inapplicable when, as here, the pendent claims are federal.[58] As the Supreme Court has declared,

> the rationale of [the rule governing pendent state-law claims] centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. These considerations favoring state adjucation are wholly irrelevant when the pendent claim is federal but is itself beyond the jurisdiction of the District Court . . . ."[59]

Moreover, there is particularly good reason for retaining a pendent claim when it owes its existence to federal law.[60] Beginning with *UMW v. Gibbs*,[61] the Supreme Court has recognized the special competence of federal courts to adjudicate claims implicating federal policy as a strong basis for exercising pendent jurisdiction. There the doc-

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[56] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1340 & n. 9.

[57] *UMW v. Gibbs, supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

[58] *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

[59] *Id.* at 548, 94 S.Ct. at 1385, 29 L.Ed.2d at 594 (footnote omitted).

[60] 13 C. Wright, A. Miller & E. Cooper, Federal Practice § 3567 at 454 (1975).

[61] *Supra* note 50.

trine of preemption limited the permissible scope of the state claim, and the Court noted that "federal courts are particularly appropriate bodies for application of preemption principles." [62]

Similarly, in *Rosado v. Wyman* [63] a Supremacy Clause [64] claim not otherwise within the court's jurisdiction was joined with a constitutional claim independently cognizable. In upholding a district court's exertion of pendent jurisdiction, even after the constitutional claim had been dismissed as moot, the Court observed that the statutory question was one of federal policy and the argument for the exercise of pendent jurisdiction was therefore particularly strong.[65]

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[62] *UMW v. Gibbs, supra* note 50, 383 U.S. at 729, 86 S.Ct. at 1140, 16 L.Ed.2d at 230.

[63] 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

[64] U.S.Const. art. VI, cl. 2.

[65] *Rosado v. Wyman, supra,* note 63, 397 U.S. at 404, 90 S.Ct. at 1214, 25 L.Ed.2d at 451. Rejecting the argument that loss of power over the primary claim because of mootness foreclosed consideration of the pendent claim, the Court also noted:

> We are not willing to defeat the common-sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

Id. at 405, 90 S.Ct. at 1214, 25 L.Ed.2d at 451 (footnote omitted). This policy of avoiding piecemeal litigation is equally viable whether the jurisdiction-conferring claim is dismissed on grounds of mootness as in *Rosado* or for failure to state a claim as in the instant case. Like the mooting of a claim, a dismissal under Fed.R.Civ.P. 12(b)(6) might not occur "until after substantial time and energy have been expended looking toward resolution of [the] dispute. . . ." *Id.* at 404, 90 S.Ct. at 1214, 25 L.Ed.2d at 451.

Likewise, in *Hagans v. Lavine,*[66] the Court approved an assumption of pendent jurisdiction over a Supremacy Clause claim in a situation where the constitutional claim, though not insubstantial in a jurisdictional sense, was likely without merit. In so doing, the Court again relied in large measure on the special capability of federal courts to adjudicate federal claims.[67]

Our review of applicable Supreme Court precedents thus reveals that the District Court's decision was unresponsive to the considerations that govern the exercise of pendent jurisdiction when the pendent claim invokes federal law. In particular, the District Court should have determined whether, with the statutory claim no longer in the case, considerations of judicial economy, convenience and fairness to litigants called for remittal of the federal constitutional claims to the state courts. We do not suggest that a federal court must automatically or necessarily assume jurisdiction of every pendent federal claim. On the contrary, pendent jurisdiction remains "a doctrine of discretion, not of plaintiffs' right."[68] We do say, however, that involvement of federal law in a pendent claim is a factor significantly affecting the proper exercise of that discretion. As Mr. Justice Douglas noted in *Rosado v. Wyman,* "[when] the claim involved . . . is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances [are] required to prevent the exercise."[69] Since we perceive nothing out of the ordinary that would justify a re-

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[66] *Supra* note 58.

[67] *Hagans v. Lavine, supra* note 58, 415 U.S. at 548 & n. 14, 94 S.Ct. at 1385 & n. 14, 39 L.Ed.2d at 594-595 & n. 14.

[68] *UMW v. Gibbs, supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

[69] 397 U.S. at 425, 90 S.Ct. at 1224, 25 L.Ed.2d at 463 (concurring opinion).

fusal of pendent jurisdiction here, we hold that the District Court erred in dismissing appellants' constitutional claims.[70] Our judgment accordingly will provide for a remand of those claims for disposition on the merits.[71]

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[70] Prior to *Hagans v. Lavine, supra,* note 58, it might have been argued that pendent jurisdiction could properly be disclaimed in light of a legislative policy expressed in 28 U.S.C. § 1331(a) (1970) that some constitutional claims below a minimum dollar amount should be left to state courts. See *id.* 415 U.S. at 559, 94 S.Ct. at 1390, 39 L.Ed.2d at 600 (Rehnquist, J., dissenting). This policy, however, was implicitly rejected by the *Hagans* majority as a persuasive ground for declining jurisdiction. *Id.* at 548, 94 S.Ct. at 1385, 39 L.Ed.2d at 594. Moreover, Congress has recently revised § 1331(a) to eliminate the $10,000 amount in controversy requirement in civil actions brought "against the United States, any agency thereof, or any officer or employee thereof in his official capacity." See note 26 *supra.* Without deciding whether the revision applies to this case, we think it clearly reflects a congressional view that federal claimants suing federal defendants should have access to federal courts regardless of the monetary value of their claims. Thus, any colorable basis for leaving the instant constitutional claims to state courts is further undercut.

PBS suggests that since assumption of pendent jurisdiction will result in decision rather than avoidance of a constitutional question, pendent jurisdiction should be refused. Brief for Appellee PBS at 29 n. 20. While the policy of avoiding difficult constitutional questions is undoubtedly a strong one, *Hagans v. Lavine, supra* note 58, 415 U.S. at 546-547 & n. 12, 94 S.Ct. at 1383-1384 & n. 12, 39 L.Ed.2d at 593-594 & n. 12, declining jurisdiction here will not eliminate the necessity of a constitutional decision, but will simply leave its disposition to state courts. As we have shown, there is no policy favoring state court adjudication of federal claims.

[71] Whether a right of action is to be inferred from the Constitution is normally a question on the merits rather than one of jurisdiction. *Bell v. Hood,* 327 U.S. 678, 681-685, 66 S.Ct. 773, 775-777, 90 L.Ed. 939, 942-945 (1946); *Cardinale v. Washington Technical Inst.,* 163 U.S. App.D.C. 123, 127-128, 500 F.2d 791, 795-796 (1974). See also *Apton v. Wilson, supra* note 52, 165 U.S.App.D.C. at 35 & n. 16, 506 F.2d at 96 & n. 16. The District Court has not yet addressed appellants' constitutional claim on that basis, see *Network Project v. Corporation for Pub. Broadcasting, supra* note 3,

III

Viewer appellants maintain that they are entitled to injunctive relief against the CPB for violation of various provisions of the Public Broadcasting Act of 1967. Since the Act does not explicitly authorize suits to enforce its provisions, any cause of action that appellants may have must be implied. The District Court noted that the Act undoubtedly was intended to benefit viewers of public television.[72] Nonetheless, the court held that implication of a right of action would seriously impede attainment of the Act's purpose and would inevitably enmesh the courts in supervision of CPB's day-to-day operations.[73] We too conclude that a right of action should not be inferred, but for reasons different from those articulated by the District Court.

To begin with, "the inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."[74] Furthermore, judicial implication of rights of action should be approached with great care "lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently."[75]

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398 F.Supp. at 1340 & n. 9, 1342, hence the remand. Of course, we intimate no view as to how the question should be decided.

[72] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1338.

[73] *Id.* at 1338-1339.

[74] *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646, 651-652 (1974).

[75] *Holloway v. Bristol Meyers Corp.*, 158 U.S. App.D.C. 207, 210, 485 F.2d 986, 989 (1973).

Thus, "[w]hen a court fairly perceives how the legislature accomplished a resolution of the balance of forces, including compromise and concession, the court must abide the result without using its own scales to weigh the strength of the component vectors."[76] With these concerns in mind, we turn to the Public Broadcasting Act to determine whether implication of a right of action is "consistent with the evident legislative intent."[77]

In 1952, the Federal Communications Commission (FCC) began to reserve channels for the exclusive use of educational television.[78] Because of the substantial installation costs, the number of noncommercial stations grew slowly.[79] In 1962, the Educational Television Facilities Act[80] responded to this problem by providing matching funds for the construction of noncommercial stations.[81] Despite rapid growth in the number of stations following its passage, however, shortage of funds and difficulty of exchanging programs among the stations forestalled elevation of the caliber of public telecasts.[82]

In 1966, the Carnegie Commission was organized to conduct a study.[83] The Commission concluded that federal financial assistance would be required to provide the re-

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[76] *Id.* at 223, 485 F.2d at 1002.

[77] See text *infra* at note 80.

[78] See *Sixth Report and Order on Television Allocation*, 41 F.C.C. 148 (1952).

[79] S.Rep.No.67, 87th Cong., 1st Sess. 3 (1961).

[80] Act of May 1, 1962, Pub.L.No.87-447, tit. III, 76 Stat. 65, as amended, 47 U.S.C. §§ 390 *et seq.* (1970 & Supp. V 1975), hereinafter cited as codified.

[81] 47 U.S.C. § 392 (1970).

[82] S.Rep.No.222, 90th Cong., 1st Sess. 4 (1967).

[83] Carnegie Commission on Educational Television, Public Television: A Program for Action (1967).

sources necessary for development of superior programs.[84] Perceiving a danger in direct governmental involvement in public broadcasting, however, the Commission recommended that a private nonprofit corporation be created to disburse governmental funds.[85] The corporation envisioned by the Commission would support local stations, "yet [would] be restrained from control of the appearance of control over them."[86] And the corporation would not escape the scrutiny that properly follows the appropriation of federal money, but would be insulated from interference with the day-to-day operation of the programming portions of its work.[87]

Congress incorporated many of the Carnegie Commission's suggestions into the Public Broadcasting Act of 1967. The Act authorized creation of the Corporation for Public Broadcasting, "a nonprofit corporation . . . which [would] not be an agency or establishment of the United States Government,"[88] as a funding mechanism for virtually all activities comprising noncommercial broadcasting.[89] Consistently with the expectations of the Commission, Congress conceived CPB as a vehicle for infusing federal money into public broadcasting without the introduction of government direction or control.[90]

In determining whether private resort to the provisions of the Act harmonizes with congressional intent, we do not write on a clean slate. In *Accuracy in Media, Inc. v.*

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[84] *Id.* at 68-79.

[85] *Id.* at 36-42.

[86] *Id.* at 37.

[87] *Id.*

[88] 47 U.S.C. § 396(b) (Supp. V 1975).

[89] *Id.* §§ 396(g)(1), (2) (Supp. V 1975).

[90] H.R.Rep.No.572, 90th Cong., 1st Sess. 15 (1967); S.Rep.No. 222, 90th Cong., 1st Sess. 4 (1967).

FCC,[91] we considered the contention that FCC had authority to enforce the Act's call on CPB to facilitate programming with "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature."[92] After reviewing the structure of the public broadcasting system, we were of the view that Section 398 of the Public Broadcasting Act expressly barred FCC jurisdiction over CPB.[93] That section specifies that nothing in the Educational Television Facilities Act[94] or the Public Broadcasting Act "shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation [for Public Broadcasting] or any of its grantees or contractors . . ."[95] Since any enforcement of the statutory requirement would necessarily entail "supervision" of CPB, we held that the plain words of Section 398 precluded FCC from acting.[96]

PBS suggests that Section 398 also forecloses implication of a private right of action since entertainment of private suits would necessarily involve the courts in "supervision," and courts, no less than administrative bodies, are governmental "agencies."[97] We reject this sweeping interpretation of the statutory prohibition. The plain purpose of Section 398 is to prevent any governmental body from

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[91] 172 U.S.App.D.C. 188, 521 F.2d 288 (1975).

[92] 47 U.S.C. § 396(g)(1)(A) (Supp. V 1975).

[93] *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App. D.C. at 192, 521 F.2d at 292.

[94] See text *supra* at notes 80-82.

[95] 47 U.S.C. § 398 (1970).

[96] *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App. D.C. at 192, 521 F.2d at 292.

[97] Brief for Appellee PBS at 24.

influencing CPB in a manner calculated to turn it into a governmental spokesman.[98] While Congress manifestly believed that FCC involvement in enforcing the Act's directives would create the very dangers that Section 398 sought to prevent,[99] it is unlikely that it made the same judgment with respect to courts occasionally summoned to resolve specific controversies arising under the Act. We would need more than PBS offers to persuade us that judicial enforcement of the Act's mandates would constitute "supervision" by a governmental "agency" within the meaning of Section 398. This is not to say that the section authorizes judicial action by negative implication, but only that it is neutral with respect to the question.

In *Accuracy in Media*, we did not rely solely on Section 398 for our holding that FCC was without power to moni-

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[98] *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App. D.C. at 193, n. 17, 521 F.2d at 293 n. 17. There we stated our understanding of § 398 as follows:

> Section 398, formerly § 397 was amended by the 1967 Act to include the Corporation and its activities. The original section was enacted as a provision of the Educational Television Facilities Act of 1962. The prohibition of federal interference was included then as a part of an understanding that "the FCC is not to exercise any control of funds under this program". S.Rep.No.67, 87th Cong., 2d Sess., at 9 (1962), U.S.Code Cong. & Admin. News 1962, pp. 1614, 1620. The expansion of the prohibition to apply to the Corporation and its activities is in keeping with the original fear that financial support by the Government could lead to control over speech.

[99] The Public Broadcasting Act leaves intact FCC regulatory authority over individual non-commercial licensees. *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App.D.C. at 196, 521 F.2d at 296. But FCC jurisdiction over CPB, we noted, could enlarge Government control over program content and thereby upset the balance struck in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) between the First Amendment rights of broadcast journalists and the interests of the viewing public. *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App.D.C. at 196-197, 521 F.2d at 296-297.

tor CPB's compliance with its statutory obligations. The structure of the Act and its history additionally persuaded us that FCC jurisdiction would be contrary to the "carefully balanced framework designed by Congress for the control of CPB activities." [100] We noted that Congress had erected numerous statutory safeguards against partisan abuses. For one conspicuous example, board membership is limited to no more than eight out of the authorized fifteen from the same political party.[101] As a further check, the Act insists that CPB's accounts be audited annually by an independent accountant,[102] and contemplates audits by the General Accounting Office.[103] Of major importance is Section 396(k), which assures that most of CPB's budget will be derived through the congressional appropriation process.[104] Section 396(i) complements these curbs with the requirements that CPB submit "a comprehensive and detailed report" on its operations and achievements to Congress annually.[105]

In consequence, we concluded that "[t]hrough these statutory requirements and control over the 'pursestrings,' *Congress reserved for itself the oversight responsibility for the Corporation.*" [106] By that statement we clearly implied that the statutory mandates are to be enforced exclusively by Congress. So, as later in our opinion we stated unequivocally, we viewed the provision advanced as the source

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[100] *Id.* at 194, 521 F.2d at 294.

[101] 47 U.S.C. § 396(c)(1) (Supp. V 1975).

[102] 47 U.S.C. § 396(*l*)(1)(A) (Supp. V 1975).

[103] 47 U.S.C. § 396(*l*)(2)(A) (Supp. V 1975).

[104] 47 U.S.C. § 396(k) (Supp. V 1975).

[105] 47 U.S.C. § 396(i) (Supp. V 1975).

[106] *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App. D.C. at 194, 521 F.2d at 294 (emphasis supplied) (footnote omitted).

of a private right of action "as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire,"[107] and "not [as] a substantive standard, legally enforcible by agency or courts."[108]

Appellants attempt to minimize the import of *Accuracy in Media* by branding its discussion of congressional oversight as dicta.[109] We think the discussion bore directly on our decision and thus has considerably more precedential value than appellants are willing to acknowledge. But even assuming that it is dicta, without *stare decisis* effect, appellants point to nothing that minimizes its persuasive force. Instead, they rely solely on a single passage from the House committee report on the Public Broadcasting Act as an indication that Congress counted on private litigation to insure CPB compliance with the statutory provisions at issue in this case.[110] That passage states:

> The educational stations must not be permitted to become vehicles for the promotion of one or another political cause, party or candidate. It is assumed that the normal checks and balances within our political system will insure that this principle will be constantly safeguarded by interested citizens.[111]

We are wholly unconvinced that by this reference to the role of "interested citizens," Congress evinced an intent to authorize private rights of action. By our reading, it connotes merely that Congress anticipated that citizen participation through the political process would assist Congress

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[107] *Id.* at 197, 521 F.2d at 297.

[108] *Id.*

[109] Brief for Appellants at 38.

[110] *Id.* at 28.

[111] H.R.Rep.No.572, 90th Cong., 1st Sess. 19-20 (1967), U.S.Code Cong. & Admin.News 1967, p. 1810.

in its oversight function. Even if the statement is deemed ambiguous, appellants' interpretation cannot withstand diametrically opposed expressions in the legislative history. Thus the passage of the committee report that directly follows the portion quoted reads:

> In the same manner that the bill strives to insulate the Corporation from governmental control, the bill provides *and the committee intends to see to it* that the local educational broadcasting stations conduct their operations without Corporation interference or control.[112]

Other legislative antecedents of the Act confirm the view expressed in *Accuracy in Media* that Congress reserved for itself exclusive oversight responsibility. Senator Cotton explained:

> If this bill becomes law, . . . and if, as time goes on, we have occasion to feel that there is a slanting, a bias, or an injustice, we instantly and immediately can do something about it. First, we can make very uncomfortable, and give a very unhappy experience to, the directors of the corporation. Second, we can shut down some of their activities in the Appropriations Committee and in the appropriating process of Congress . . . . The Corporation is much more readily accessible . . . to the Congress, if it is desired to correct any injustice or bias which might appear.[113]

Senator Pastore makes this intent equally plain:

> [T]he *whole responsibility* here under this law is to the Congress of the United States . . . . We don't have to repeat the appropriation if we feel this is a failure.

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[112] *Id.* at 20, U.S.Code Cong. & Admin.News 1967, p. 1810 (emphasis supplied).

[113] 113 Cong.Rec. 13003 (1967).

> This is all subject to the scrutiny of the Congress of the United States.[114]

And, lest we forget, the very structure of the Act reinforces the thesis that Congress felt no need for judicial intervention to exact due regard for the Act.[115]

We hold that private rights of action are not part of the machinery devised by Congress for control of CPB's activities. We accordingly affirm the District Court's rejection of appellants' statutory claims. For reasons articulated earlier, however, we think their constitutional claims were properly before the court.[116] To the extent necessary to enable their consideration on the merits, we reverse the judgment appealed from and remand the case for further proceedings consistent with this opinion.

So ordered.

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[114] *Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 123 (1967) (emphasis supplied).

[115] Text *supra* at notes 100-105.

[116] Text *supra* at notes 50-71.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

NETWORK PROJECT et al., *Plaintiffs,*

v.

CORPORATION FOR PUBLIC BROADCASTING et al., *Defendants.*

Civ. A. No. 1059-73.

July 23, 1975

Memorandum and Order

CORCORAN, District Judge.

In this action the plaintiffs seek declaratory and injunctive relief and damages for alleged violations of their rights under the Public Broadcasting Act of 1967 (the Act), *as amended,* 47 U.S.C. § 396 *et seq.* (1970), and under the First and Fifth Amendments to the Constitution. For reasons set out below, the Court concludes that the case against the individual defendants is moot; that the plaintiffs have no implied private right of action under the Public Broadcasting Act of 1967; and that the complaint is otherwise jurisdictionally defective.

I

THE PARTIES

The plaintiffs are: (1) the Network Project, an unincorporated membership organization whose membership allegedly includes viewers of noncommercial educational television; (2) the American Civil Liberties Union (ACLU), many of whose members are alleged to be regular viewers of noncommercial educational television; (3) 11 individuals who claim to be viewers of noncommercial educational television; and (4) three individuals, *viz.,* Paul Jacobs, Saul Landau and John Kuney, who claim to have

written, produced or directed programs for noncommercial educational television.

The defendants are: (1) the Corporation for Public Broadcasting (CPB); (2) the Public Broadcasting Service (PBS); and (3) Clay T. Whitehead and Patrick J. Buchanan (the federal defendants).

CPB is a nonprofit corporation, incorporated under the laws of the District of Columbia and established pursuant to the Act. The CPB was established to facilitate the development of educational broadcasting, to assist in the development of systems of interconnection for the distribution of educational television and radio programs and to engage in those activities in ways that will most effectively assure the maximum freedom of noncommercial educational systems and stations from interference. 47 U.S.C. § 396(g)(1)(A)-(D).

PBS is a nonprofit membership corporation organized under the laws of the District of Columbia. Its membership consists of the licensees of noncommercial educational television stations. The purpose of PBS, according to its Articles of Incorporation, is to arrange for and provide interconnection facilities for the distribution of noncommercial broadcast programs and to generally assist and support noncommercial broadcasting pursuant to the Public Broadcasting Act.[1] The Act provides that CPB will facilitate the establishment of one or more interconnection systems; it does not however provide specifically for PBS's existence.

Clay T. Whitehead, one of the federal defendants, is the former Director of the Office of Telecommunications Policy (OTP), a part of the Executive Office of the President, established pursuant to the President's Reorganization

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[1] Appendix B, Appendices to Memorandum of Points and Authorities in Support of the Public Broadcasting Service's Motion to Dismiss, at 7-9 (Sept. 6, 1973).

Plan No. 1 of 1970, 3 C.F.R. 1066 (1966-1970 Comp.). He resigned from his position effective September 15, 1974, after commencement of this action. The responsibilities of the Director of OTP are, (and were) *inter alia*, to serve as the President's principal adviser on telecommunications, assure effective communication of the views of the Executive Branch on telecommunications policy to Congress and to the Federal Communications Commission (FCC), and to coordinate telecommunications activities of the Executive Branch. Executive Order No. 11556, September 4, 1970.

Patrick J. Buchanan, the other federal defendant, is a former Special Consultant to the President. He resigned effective November 15, 1974, after the commencement of this suit. He gave advice and counsel to the President on public broadcasting as part of his duties as Special Consultant.

II

Pleadings

The plaintiffs complain that the defendants have acted in violation of the Public Broadcasting Act and the First and Fifth Amendments.

They cite defendants Whitehead and Buchanan for allegedly attempting to influence votes by the CPB Board of Directors, to cause the CPB to cease funding controversial public affairs programming, and to have certain educational network broadcasters removed from the air.

The plaintiffs also allege that CPB and PBS acted illegally in that they engaged in the practices of censoring entire programs, or parts thereof, prior to distribution to local stations; prescreening and allowing others to prescreen programs produced for noncommercial educational television prior to distribution; issuing warnings to—"flagging"—local stations of program content considered

by them to be controversial; requiring detailed descriptions of program content in applications for funding; and allowing the federal defendants (Whitehead and Buchanan) to affect program content. In addition, plaintiffs charge violations of the Act by CPB in that CPB allegedly participates illegally in programming and operation of a network. Finally, they charge that the CPB Board of Directors is illegally constituted.

CPB and PBS and the federal defendants have each moved to dismiss the action on various grounds. Consideration of the various arguments of the defendants follow.

III

Mootness As To The Federal Defendants

As noted, the plaintiffs allege illegal activity on the part of the federal defendants Whitehead and Buchanan both as individuals and in their official capacities. On January 16, 1975, the federal defendants filed a supplemental memorandum in support of their motion to dismiss which added the additional ground that since Whitehead and Buchanan no longer occupy official positions with the executive office the claims against them are moot. The Court agrees.

The federal courts are limited to the resolution of actual cases and controversies by Article III of the Constitution. There must be "concrete legal issues, presented in actual cases, not abstractions." *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113 (1969). If it is determined at any stage of the proceeding that a case was moot when initiated or became moot because of subsequent events, the Court is without jurisdiction because "[m]ootness is a jurisdictional question." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). *Accord, People of State of California v. San Pablo & Tulane R. Co.*, 149 U.S. 308, 13 S.Ct. 876, 37 L.Ed. 747 (1893); *State of Alabama ex rel. Baxley v. Woody*, 473 F.2d 10 (5th Cir. 1973).

We look first at the claims asserted against the federal defendants as individuals.

It is clear that the declaratory and injunctive relief sought against these defendants relates to power which they possessed as government officials and that there is no basis now, after their resignations from office, for asserting that these individuals represent a threat to the exercise of illegal direction, supervision or control over CPB or its grantees.

The claims against these defendants in their individual capacities are also based upon § 398 of the Act, and the First Amendment. But § 398 is limited in its application to departments, agencies, officers and employees of the United States, and the First Amendment acts only as a restraint upon government action, not that of private persons. *Cf. Public Utilities Commission v. Pollak,* 343 U.S. 451, 461, 72 S.Ct. 813, 96 L.Ed. 1068 (1952). Since Whitehead and Buchanan are no longer in the class of people against whom these provisions operate, the claims against them in their individual capacities are moot. *Cf. DeFunis v. Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

The claims against the federal defendants in their official capacities, however, require further consideration.

Fed.R.Civ.P. 25(d)(1) provides for "automatic substitution":

> When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party.

The Advisory Committee Notes state that "[i]n general [the rule] will apply whenever effective relief would call for corrective behavior by the one then having official status

and power, rather than one who has lost that status and power through ceasing to hold office." 3B *J. Moore, Federal Practice* ¶ 25.01(13), at 25-38 (2d ed. 1974). *See also Spomer v. Littleton*, 414 U.S. 514, 521 n. 9, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974); 3B *J. Moore, Federal Practice* ¶ 21.09 (1)-(3) (3d ed. 1974). Substitution is appropriate when the original officer is replaced by an acting officer. *City of New York v. Ruckelshaus*, 358 F.Supp. 669 (D.D.C.1973), *aff'd sub nom. Train v. City of New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

The "effective relief" test suggested in the Advisory Committee Notes supports application of Rule 25(d)(1) in this case. The effective relief sought by plaintiffs here, declaratory and injunctive relief regarding past, present and future actions, would have to apply to officials in office. Thus, we must determine whether, in this case, there are appropriate substitute officials within the meaning of the rule.

As to Buchanan it is alleged that upon his resignation his "duties" were taken over by Dean Burch, Counsellor to the President, and later distributed among three different presidential advisers. The difficulty in applying Rule 25(d)(1) to this situation is that Buchanan's position as Special Consultant to the President is not designated to have specific duties and functions under any statutes or regulations. In view of the personal nature of that office, so closely associated with the President, this Court finds that there is no adequate basis for the operation of Rule 25(d)(1) as to defendant Buchanan. Since Buchanan no longer occupies his official position and relief against him as an individual is moot, this Court finds that all claims against defendant Buchanan should be dismissed as moot.

The situation as to Whitehead is different. It is uncontradicted that Whitehead has a successor, John Eger, occupying his position as *Acting* Director. Eger's substitution under Rule 25(d)(1) would accordingly be appropriate.

However, the federal defendants still contend that actions against Eger, Whitehead's successor, would also be moot because the plaintiff's have failed adequately to allege that the successor has continued the allegedly illegal acts of the predecessor. The 1961 amendments to Rule 25 (d)(1) removed the requirement that plaintiff must demonstrate the need for continuing the action upon substitution; however, the complaint may be subject to challenge for mootness by the successor. 3B *J. Moore, Federal Practice* ¶ 25.09(3); Advisory Committee Notes of 1961 to Rule 25(d)(1), *id.* ¶ 25.01(13).

In the recent case of *Spomer v. Littleton,* 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974), the Supreme Court considered the issue of mootness in the context of "automatic substitution" of the defendant's elected successor.[2] The plaintiffs, black citizens, alleging that the local prosecutor and his staff had engaged in specific acts of racial discrimination, sought declaratory and injunctive relief and damages. The Court held that where the complained of illegal actions are personal, no allegations being made that the actions reflect official administration policy, and the plaintiff fails to allege specifically that the successor intends to continue the actions, the complaint is subject to dismissal as moot. The Court distinguished *Allen v. Regents of the University System of Georgia,* 304 U.S. 439, 444-45, 58 S.Ct. 980, 82 L.Ed. 1448 (1938), where university officials challenged tax collection policies of the Collector of Internal Revenue which reflected interpretations of the Internal Revenue Code. The Court held in *Allen* that the allegations were sufficient to justify substitution and withstand challenge for mootness.

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[2] In *Spomer v. Littleton, supra,* there was automatic substitution of a successor under Supreme Court Rule 48(3), which is equivalent to and based upon Fed.R.Civ.P. 25(d) as amended in 1961. 414 U.S. at 521 n. 9, 94 S.Ct. 685.

Here the plaintiffs have alleged that defendants Whitehead and Buchanan "and other officers and employees of the United States" influenced and coerced CPB Directors, employees, and grantees, and employees of PBS, with the intent to interfere with and control program content. Although plaintiffs allege specific acts of defendants Whitehead and Buchanan, they have not alleged that those acts reflected a general policy of the Executive Branch which could be assumed to have continued to exist under Whitehead's successor. The general allegations as to other unidentified officers and employees do not cure this defect. Therefore, the Court concludes that the claims for declaratory and injunctive relief against the federal defendant Whitehead and his successor in their official capacities are moot.[3]

IV

Implication Of A Private Right Of Action Under The Public Broadcasting Act of 1967

The plaintiffs allege that the actions of the defendants violate §§ 396 and 398 of the Act and that they have a private right of action to enforce those sections. Although unable to identify an express provision of such a right, plaintiffs contend that private actions are not precluded by Congress and this particular act necessarily implies a right of action. The Court disagrees.

Recent cases indicate that implication of a right of action from a statute requires close examination of the statute and its legislative history—"the inference of such a private cause of action not otherwise authorized by the

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[3] Similarly, plaintiffs' Ninth Claim for Relief, *see* note 5 *infra*, alleging that one member of the CPB Board of Directors, Irving Kristol, is serving illegally because he has not been confirmed by the Senate, 47 U.S.C. § 396(c)(1), is also moot for the reasons stated above. The Court is reliably informed that Mr. Kristol severed all official connections with CPB on or about December 31, 1973.

statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974) (*Amtrak*). *See also Cort v. Ash*, —— U.S. ——, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) (*SIPC*); *Holloway v. Bristol-Meyers Corp.*, 158 U.S.App.D.C. 207, 485 F.2d 986 (1973). In each of these cases, the courts denied a claim to an implied right of action because such action might disrupt the system established by Congress for accomplishing the purposes of the statute, and there was no indication of a legislative intent to permit the action.

Those cases, of course, contrast sharply with *J. I. Case v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), which did recognize an implied right of action. There the Court held that the Securities Exchange Act of 1934, clearly a regulatory and remedial statute, created a right of action in favor of stockholders damaged by misrepresentations violative of § 14(a) of the Securities Exchange Act of 1934. The Court concluded that the "broad remedial purposes" of the Act and the necessity for private action to effectuate those purposes supported the implication of such a right. But the Public Broadcasting Act is neither remedial nor regulatory, and in contrast to *Borak* there is no indication that the Congress passed the Act to protect any threatened rights.

The plaintiffs contend, however, that as viewers they fall within a category of persons which Congress sought to benefit and that there will be no assurance that those benefits will be available unless viewers are given a right of action to police the activities of CPB.

It is unquestioned that the Act accords benefits to viewers. That is apparent from § 396(a) which provides in part:

> (4) that it furthers the general welfare to encourage noncommercial educational radio and television broadcast programming which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence;
>
> (5) that it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States; . . . . 47 U.S.C. § 396(a).

But although the "intent to benefit" is apparent,[4] the plaintiffs still fail to demonstrate that the right of action is necessary and appropriate within the meaning of *Borak, Cort, Amtrak, SIPC,* and *Holloway, supra.*

In determining whether an alleged implied right of action exists in this case it is important to keep in mind not only what Congress sought to accomplish but the means they provided to accomplish their declared purposes.

The picture which emerges from the statute and its legislative history is that Congress used every effort and every device available to create an entity which would provide maximum financial and other assistance to the noncommercial educational broadcasting industry with a minimum of federal government involvement. The design is capsulized in the language of § 398 which says in part:

> . . . Nothing contained in this part shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or

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[4] The plaintiffs have not specifically argued that the writer, producer, and director plaintiffs were within the group intended to be benefited, and this Court finds no basis for such an assertion.

> radio broadcasting, or over the Corporation of any of its grantees or contractors, or over the charter or by-laws of the Corporation . . . . § 398.

By the same token there is no indication whatsoever that Congress intended to provide a private right of action to dissident viewers or other individuals who might be dissatisfied with the operations of CBP.

In the view of the Court, were it to allow suits under the Act by persons who had no more than a viewing interest or who were otherwise merely dissatisfied with the manner in which CPB or its grantees carry out the purposes of the Act, it would seriously impede the attainment of the stated purposes of the Act, and it would inevitably enmesh the courts in supervision of the detailed day-to-day operations of CPB—a result which Congress clearly intended to avoid.[5]

V

Jurisdictional Issues

We now turn to plaintiffs' claims of jurisdiction based on 28 U.S.C. §§ 1361, 1337 and 1331(a).

28 U.S.C. § 1361. District courts have original jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plain-

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[5] Plaintiffs' Ninth Claim for Relief alleges, *inter alia*, that CPB's Board of Directors is improperly constituted, in violation of the Public Broadcasting Act of 1967 and of the First Amendment. Even if such a claim were judicially cognizable, *see Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Keim v. United States*, 177 U.S. 290, 20 S.Ct. 574, 44 L.Ed. 774 (1900), inasmuch as it is embraced within the Public Broadcasting Act of 1967, the claim must fail for the reasons stated above in this Part. Furthermore, bottoming such a claim under the rubric of the First Amendment is of no avail in these circumstances. *See* Part V *infra*. *See also* note 3 *supra*.

tiff." The Court agrees with the defendants that § 1361 is inappropriate in this case because CPB and PBS are not agencies of the United States and the members of the CPB Board of Directors are not officers of the United States. The Act specifically provides that CPB "will not be an agency or establishment of the United States Government." 47 U.S.C. § 396(b).[6]

28 U.S.C. § 1337. District Courts have original jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Plaintiffs assert jurisdiction under this section by virtue of the fact that the Act came into being as an amendment (Title III) to the Communications Act of 1934, which has been held to be an act regulating commerce. *National Broadcasting Co. v. United States,* 319 U.S. 190, 227, 63 S.Ct. 997, 87 L.Ed.2d 1344 (1934).[7] The defendants counter that the Act, by its terms, was enacted under the "general welfare" clause of the Constitution,[8] not the commerce clause, thus making § 1337 inapplicable to this action.

We need not resolve this dispute in view of our holding, *supra,* that there is no implied private right of action under

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[6] Necessarily, then, plaintiffs' reliance on PBS being an agent of CPB for mandamus purposes must also fail. Moreover, PBS is not mentioned at all in the Act.

[7] It does not follow, however, that there is an implied right of action under the Communications Act of 1934. *See, e.g., Smothers v. Columbia Broadcasting System, Inc.,* 351 F.Supp. 622, 624-25 (C.D.Cal.1972), and cases cited therein.

[8] 47 U.S.C. § 396(a)(4) provides:

> The Congress hereby finds and declares that it furthers the *general welfare* to encourage noncommercial educational radio and television broadcast programming which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. (Emphasis added.)

the Public Broadcasting Act, even if the Act is held to be a regulation of commerce.[9]

28 U.S.C. § 1331(a). This is the "federal question" section, under which plaintiff-viewers assert violations of the First and Fifth Amendments. Plaintiff-viewers claim that the defendants have violated their First Amendment rights to uncensored programs, and to information and knowledge through noncommercial educational television.

However, as plaintiffs recognize, § 1331(a) is not available to confer jurisdiction unless the plaintiffs can also meet the $10,000 requirement. But, it is well established, too, that a dismissal of the complaint for failure to meet the $10,000 requirement is inappropriate unless it appears to a legal certainty that the plaintiff could not recover that statutory amount. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1938); *Gomez v. Wilson*, 155 U.S.App.D.C. 242, 251, 477 F.2d 411, 420 (1973).

When, as here, the allegation of the jurisdictional amount is controverted, the burden is on the plaintiff to establish that amount. *Gomez v. Wilson, supra. See also Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183 (1936). Moreover, the fact that the plaintiff alleges the deprivation of some constitutional right, as here, does not translate to mean that the requisite jurisdictional amount need not be satisfied. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 547, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972); *James v. Lusby*, 162 U.S.App.D.C. 352, 499 F.2d 488 (1974); *Gomez v. Wilson, supra.*

Assuming, *arguendo*, that the plaintiff-viewers have properly pleaded a constitutional right to receive uncensored noncommercial educational television programs, the

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[9] In that instance, there is no pendent jurisdiction under § 1337. *Post* v. *Peyton*, 323 F.Supp. 799 (E.D.N.Y.1971).

Court concludes that their attempted valuations of that right do not satisfy the statutory standard.[10]

Plaintiffs contend that the $10,000 requirement is met by reason of the following:

(1) First Amendment rights are worth more than $10,000 by definition;

(2) it would cost each plaintiff $10,000 to purchase the unconstitutionally censored programs;

(3) the damages done to noncommercial educational broadcasting has harmed each plaintiff at least $10,000; and

(4) the cost to the defendants in the event of a judgment for the plaintiffs would be in excess of $10,000.

We look at each of these claims.

(1) As to plaintiff-viewers' assertion that First Amendment rights are by definition worth more than $10,000, it is well established in this Circuit that "any automatic finding of the required amount in controversy just because (constitutional) rights are in issue may be more than § 1331(a) will tolerate." *Gomez v. Wilson, supra,* 155 U.S.App.D.C. at 252 n. 56, 477 F.2d at 421 n. 56. Accordingly, this assertion, without more, must fail.

(2) In measuring the pecuniary value to the claim of the deprivation of their right to receive, plaintiffs attempt to

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[10] Although plaintiffs do not seek to maintain a class action, it is nevertheless clear beyond doubt that each of the plaintiffs must individually have in controversy an amount in excess of $10,000. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973); *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969).

For the purposes of a motion to dismiss, it is clear, of course, that the allegations of plaintiffs' complaint must be taken as true. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967).

ascribe that valuation in terms of the cost to them in purchasing "lost" programs. This argument, while ingenious,[11] is wide of the mark for two reasons. First, this argument employs a measure of damages not consonant with the asserted loss of a right to receive as set out in their complaint. The claim of the plaintiff-viewers is that they were deprived of the opportunity to experience the ideas and viewpoints contained in certain programs via noncommercial educational television; their complaint does not allege that they were precluded from purchasing such programs. Indeed, plaintiffs' measure of damages in this regard would appear to violate the rules and regulations of the Federal Communications Commission that local licensees must retain the absolute right to edit, select and reject programs. 47 C.F.R. § 73.658(e). *See also National Broadcasting Co. v. United States, supra.* More basically, plaintiffs' argument is devoid of any competent proof that the cost of acquiring a certain program allegedly censored by defendants would in fact exceed $10,000. *Cf. James v. Lusby, supra.*

(3) Plaintiffs' contention that they are harmed because the institution of noncommercial educational television broadcasting is damaged by the defendants' assertedly unlawful activities is wholly speculative and without any factual foundation. Indeed, there is a conspicuous lack of any concrete injury susceptible to even a low standard of pecuniary valuation. In resolving complex constitutional claims, the federal judicial process may not operate in an amorphous, undefined atmosphere.[12]

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[11] "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973).

[12] In an analagous context, the Supreme Court has consistently held that generalized grievances common to a class do not ordinarily satisfy jurisdictional prerequisites. *See, e. g., Schlesinger v. Reser-*

(4) In terms of the judgment which the case would produce with regard to the effect on the defendants' activities, were the plaintiffs successful on the merits, the plaintiffs have failed utterly to specify what costs would conceivably be involved. Furthermore, it would appear, as CPB and PBS contend, that the prayer for relief, if granted in full, would merely require CPB and PBS to allocate funds differently than they do at present, rather than resulting in increased costs to those defendants.

Thus, it is clear that none of the plaintiff-viewers has satisfied the requisite jurisdictional amount, and the complaint must be dismissed as to them.[13] *Post v. Payton,*

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vists Comm. to Stop the War, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed. 2d 706 (1974). Similarly, the interests at stake in federal constitutional litigation must generally be those of the plaintiffs at bar, rather than those of third parties. *See, e. g., United States v. Raines,* 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Tileston v. Ullman,* 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943).

[13] The claims of non-viewer plaintiffs Jacobs, Kuney and Landau, set out in the Fourth Claim for Relief, are not on any firmer footing. In their affidavits these plaintiffs assert that, as a result of the alleged failure of CPB and PBS to distribute programs they wrote, directed and produced, they have lost their jobs, have been unable to find similar positions in the noncommercial educational television industry, and that their reputations have been injured. They seek damages for the supposed injury to their professional reputations and for the failure to have their work product distributed over noncommercial educational television.

The damages these plaintiffs seek are not for the injury from CPB's and PBS's denial of their alleged rights to communicate ideas or experiences, but rather are damages emanating from loss of jobs and injuries to reputations. These rights, whatever their scope, and the damages, if any, flowing from their alleged violation, are irrelevant to the matter in controversy. The First and Fifth Amendments and the Public Broadcasting Act of 1967 do not protect either these plaintiffs' right to work in the noncommercial educational television field or their professional reputations in that field. Therefore, the Fourth Claim for Relief must be dismissed for failure to state a cause of action upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

supra. Cf. Kheel v. Port of New York Authority, 457 F.2d 46 (2d Cir.), *cert. denied,* 409 U.S. 983, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972).

VI

In light of the foregoing, the Court need not reach the remaining First Amendment claims of the plaintiff-viewers, *viz.,* whether CPB and PBS are sufficiently imbued with "state action;"[14] whether these plaintiffs have stated a cause of action of a right to receive under the First Amendment;[15] and whether these plaintiffs have the requisite "standing" to maintain such a cause of action.[16]

Accordingly, it is by the Court this 23rd day of July, 1975,

Ordered, adjudged and decreed that plaintiffs' complaint against the federal defendants Whithead and Buchanan be, and the same is hereby, dismissed as moot; and it is further

Ordered, adjudged and decreed that plaintiffs' Ninth Claim for Relief in the complaint, concerning Irving Kristol, be, and the same is hereby, dismissed as moot; and it is further

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[14] *See, e. g., Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Greenya v. George Washington University,* 512 F.2d 556 (D.C.Cir. 1975).

[15] *See, e. g., Kleindienst v. Mandel,* 408 U.S. 753, 82 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Avins v. Rutgers,* 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982 (1968). *Compare Comment—The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations,* 63 Geo.L.J. 775 (1975).

[16] *See, e. g., Warth v. Seldin,* —— U.S. ——, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Schlesinger v. Reservists Comm. to Stop the War, supra; United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *S. v. D.,* 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973).

Ordered, adjudged and decreed that plaintiffs' complaint alleging a private cause of action for damages and declaratory and injunctive relief under the Public Broadcasting Act of 1967 be, and the same is hereby, dismissed for failure to state a claim upon which relief can be granted; and it is further

Ordered, adjudged and decreed that plaintiffs' complaint alleging jurisdiction under 28 U.S.C. §§ 1337 and 1361 (1970) be, and the same is hereby, dismissed for want of such jurisdiction; and it is further

Ordered, adjudged and decreed that plaintiffs' complaint alleging jurisdiction under 28 U.S.C. § 1331(a) (1970) be, and the same is hereby, dismissed for failure to satisfy the $10,000 jurisdictional amount; and it is further

Ordered, adjudged and decreed that plaintiffs' Fourth Claim for Relief in the complaint be, and the same is hereby, dismissed for failure to state a claim upon which relief can be granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1977

CIVIL 1059-73

No. 75-1963

THE NETWORK PROJECT, et al., *Appellants*
v.
CORPORATION FOR PUBLIC BROADCASTING, A Corporation, et al

Appeal from the United States District Court for the District of Columbia.

Before: ROBINSON and WILKEY, Circuit Judges, and WILLIAM J. JAMESON,* United States Senior District Judge for the District of Montana.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment—of the District Court appealed from in this cause is hereby affirmed as to rejection of appellants' statutory claims and to the extent necessary to enable consideration of the constitutional claims on the merits, we reverse the judgment appealed from and remand the case for further proceedings, consistent with the opinion of the Court filed herein this date.

Per Curiam
For the Court
A. Fisher, Clerk

/s/ By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-356, OCTOBER TERM, 1977

CORPORATION FOR PUBLIC BROADCASTING, *Petitioner*,

v.

THE NETWORK PROJECT, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 15, 1977.

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 26th day of October, 1977.

APPENDIX E

Relevant Statutory and Constitutional Provisions

A. STATUTES

1. Judicial Code, 28 U.S.C. § 1331(a):

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

2. Judicial Code, 28 U.S.C. § 1337:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

3. Judicial Code, 28 U.S.C. § 1361:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

4. Section 396(b) of the Public Broadcasting Act of 1967, 47 U.S.C. § 396(b):

(b) There is authorized to be established a nonprofit corporation, to be known as the "Corporation for Public Broadcasting", which will not be an agency or establishment of the United States Government. The Corporation shall be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

B. Constitutional Provisions

Constitution of the United States, Art. III, §§ 1 and 2:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.